

PHOENIX RESOURCES CO.

IBLA 78-343

Decided January 29, 1979

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, holding that oil and gas leases, W 10337, W 10338, W 10339, and W 47129 have expired as of midnight, January 31, 1978.

Affirmed.

Appeal from a decision of the Area Oil and Gas Supervisor, Conservation Division, Geological Survey, Casper, Wyoming, denying request for termination of Kent Ranch III unit agreement.

Dismissed.

1. Oil and Gas Leases: Drilling—Oil and Gas Leases: Extensions

The actions of a lessee in reentering a well to a depth of 11,640 feet where said well has been previously drilled to a depth of 12,895 feet do not constitute actual drilling operations within the terms of 30 U.S.C. § 226(e) (1976) so as to entitle the lessee to a 2-year extension of an oil and gas lease by drilling over the terminal date of the lease.

2. Oil and Gas Leases: Drilling—Oil and Gas Leases: Extensions

To obtain an extension to an oil and gas lease by drilling over the terminal date, actual drilling operations must be conducted in such a way as to be an effort which one seriously looking for oil and gas could be expected to make in that particular area, given existing knowledge of geological and other pertinent facts.

3. Oil and Gas Leases: Drilling—Oil and Gas Leases: Extensions

To qualify for an extension of a lease under 30 U.S.C. § 226(e) (1976), the evidence must show that actual drilling operations were diligently pursued on the leasehold on the last day of the lease, with bona fide intent to complete a producing well, as demonstrated by circumstances, e.g., by a showing that the operation was thereafter expeditiously carried forward to such an extent that the effort constituted an acceptable test of a geologic stratum where it could reasonably be anticipated that commercial quantities of oil and/or gas might be discovered.

The bona fide intent of the lessee and the diligence with which he carries out that intent must be tested in accordance with the regulations, 43 CFR 3107.2-1 *et seq.*, not only by the activity in progress at midnight of the last day, but by what transpires subsequently.

4. Administrative Procedure: Judicial Review—Appeals—Rules of Practice: Appeals

A party adversely affected by a final order or decision of an officer of the Conservation Division of the Geological Survey has a right to appeal to the Director, Geological Survey, unless the decision was approved by the Secretary or Director prior to promulgation.

A party adversely affected by a final decision of the Director, Geological Survey, had a right of appeal to the Board of Land Appeals in the Office of Hearings and Appeals, Office of the Secretary.

APPEARANCES: R. E. Dippo, Esq., for appellant.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Phoenix Resources Co. appeals from a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated March 2, 1978,

holding certain oil and gas leases, W 10337, W 10338, W 10339, and W 47192, to have expired as of midnight, January 31, 1978. Phoenix also appeals to this Board from a decision of the Area Oil and Gas Supervisor, Conservation Division of Geological Survey, Casper, Wyoming, denying its request for termination of a unit agreement.

Appellant is the successor in interest to King Resources Co. as the result of a Chapter X reorganization. Appellant is also the successor Unit Operator of the Kent Ranch III Unit, approved November 11, 1977, to which the aforementioned leases were committed. The leases in question were originally issued effective February 1, 1968, for a primary period of 10 years, i.e., until January 31, 1978, and so long thereafter as oil or gas is produced in paying quantities.

On December 22, 1977, appellant filed in the office of the Area Oil and Gas Supervisor, Casper, Wyoming, a request for termination of the Kent Ranch III unit agreement. The action was taken upon appellant's finding that the unitized lands, and specifically well No. 15-1, were incapable of production of unitized substances in paying quantities.

While drilling operations were underway on well No. 15-1, Phoenix reentered well No. 16-1 located on a State tract committed to the unit agreement. The drilling rig used on well No. 16-1 was released on December 22, 1977, and further operations were temporarily suspended pending a decision on its request for termination of the unit agreement.

On January 19, 1978, and thereafter on February 27, 1978, the area oil and gas supervisor advised appellant that its request for termination would not be approved until well No. 16-1 were either plugged and abandoned or determined to be incapable of producing unitized substances in paying quantities. The rationale for this decision of the supervisor was that termination of a unit agreement was inconsistent with the unit agreement so long as operations were in progress on committed lands.

Appellant resumed operations on well No. 16-1 on January 26, 1978, and alleges performance of the following tasks: perforation of the Frontier Formation at 11,413 feet to 11,441 feet, performance of 10 stage frac operations, circulating and testing, running 2-inch tubing, and the setting of a Halliburton RTTS packer at 11,200 feet. These operations continued through February 4, 1978.

By a letter dated March 2, 1978, BLM notified appellant that its activities in reentering well No. 16-1 did not qualify as drilling operations over the expiration date of the leases, and consequently the leases were held to have expired.

Phoenix appeals from BLM's decision and sets forth two grounds for its appeal:

(1) The actions of Phoenix undertaken on January 26, 1978, and continued beyond the period of its primary term, constitute "actual drilling operations" and entitle appellant to a 2-year extension of its leases pursuant to 43 CFR 3107.2.

(2) Phoenix was wrongfully denied a 2-year extension of its leases by the action of the area oil and gas supervisor denying appellant's request for termination of its unit agreement.

30 U.S.C. § 226(e) (1976) sets forth the applicable law with respect to appellant's first ground for appeal:

Any lease issued under this section for land on which, or for which under an approved cooperative or unit plan of development or operation, actual drilling operations were commenced prior to the end of its primary term and are being diligently prosecuted at that time, shall be extended for two years and so long thereafter as oil or gas is produced in paying quantities.

We hold that the activities of Phoenix undertaken on January 27, 1977, and continued beyond the period of its primary term do not constitute actual drilling operations sufficient to entitle appellant to a 2-year extension of its leases.

[1] Well No. 16-1 was originally drilled as unit well 42X-16 under the Kent Ranch II unit agreement to a depth of 12,895 feet. During the critical period of time prior to the end of its primary term, appellant did not exceed this depth by deepening the original hole. Indeed, appellant is unable to allege that it reached a depth in excess of 11,640 feet. We hold that appellant's drilling activities which failed to deepen a preexisting hole do not constitute actual drilling operations within the terms of 30 U.S.C. § 226(e) (1976).

The regulations implementing 30 U.S.C. § 226(e) aid us in our decision. 43 CFR 3107.2-1(a) defines the term "actual drilling operations" to include not only the physical drilling of a well but the testing, completing, or equipping of such well for the production of oil or gas.

[2] Especially helpful is 43 CFR 3107.2-2 wherein it is stated: "Actual drilling operations must be conducted in such a way as to be an effort which one seriously looking for oil and gas could be expected to make in that particular area, given existing knowledge of geologic and other pertinent facts."

[3] To qualify for the extension the evidence must show that actual drilling operations were diligently pursued on the leasehold on the last day of the lease, with bona fide intent to complete a producing well, as demonstrated by circumstances, e.g., by a showing that the operation was thereafter expeditiously carried forward to such an extent that the effort constituted an acceptable test of a geologic stratum where it could reasonably be anticipated that commercial quantities of oil and/or gas might be discovered. D. L. Cook, 20 IBLA 315 (1975).

Appellant was aware of the yield of well No. 16-1, having previously drilled to a depth of 12,895 feet. Its actions in drilling to a depth of 11,640 feet during the period prior to the end of its primary term cannot be considered to be the actions of one seriously looking for oil and gas in that particular area, especially in light of appellant's familiarity with well No. 16-1.

We are further aided in our decision by examining the action of appellant subsequent to the final day of its primary term, January 31, 1978. Appellant's actions consisted of circulating and testing on February 1, 1978, and running 2-inch tubing and setting a Halliburton RTTS packer at 11,200 feet on February 3 and 4, 1978. Hence, appellant's activities extended only 4 days beyond the final day of its primary term. In the 6-month period following this activity, appellant has filed no status reports on well No. 16-1 to indicate any further efforts towards production.

The importance of examining the appellant's activities following the final day of its primary term is set forth in Thelma M. Holbrook, 75 I.D. 329 (1968). Therein at page 333 the terms of a similar statute were examined:

A common sense reading of section 4(d) [of the Mineral Leasing Act Revision of 1960, 30 U.S.C. § 226-1(d) (1970)] makes it apparent that post-lease termination activities may properly be considered in determining whether the statutory requirements have been met. Indeed they may afford the only basis for making this determination. Section 4(d) requires that actual drilling operations be commenced prior to the end of the primary term. This means that a well can be spudded at any time prior to midnight of the last day of the lease term. Suppose that actual drilling of a well was begun at 11:45 p.m. and diligently continued for 20 minutes until 12:05 a.m. The drilling was stopped and the rig removed. Could it rationally be said that the post-midnight activities could not be considered and that the lessee must be held to be entitled

to an extension because he had commenced his drilling prior to midnight and was diligently drilling at midnight? The statute cannot be so literally—and blindly—read as permitting so obvious a sham and deception.

In *D. L. Cook*, *supra*, we said: "[T]he bona fide intent of the lessee and the diligence with which he carries out that intent must be tested in accordance with the regulation not only by the activity in progress at midnight of the last day, but by what transpires subsequently."

The efforts of appellant subsequent to January 31, 1978, reinforce our conclusion that actual drilling operations did not take place during the period prior to the end of its primary term.

The second ground for appeal of BLM's decision raised by Phoenix, *viz.*, that it has been wrongfully denied a 2-year extension of its leases by the action of the area oil and gas supervisor denying appellant's request for termination of its unit agreement, can be readily answered.

Implicit in the BLM decision holding the leases to have terminated is a finding that appellant was not entitled to a 2-year extension based upon 43 CFR 3107.5. That section reads:

Any lease eliminated from any approved or prescribed cooperative or unit plan or from any communitization or drilling agreement authorized by the act, and any lease in effect at the termination of such plan or agreement, unless relinquished, shall continue in effect for the original term of the lease, or for 2 years after its elimination from the plan or agreement or the termination thereof, whichever is the longer, and so long thereafter as oil or gas is produced in paying quantities.

Appellant concedes that the decision of the BLM implicitly denying to it an extension pursuant to 43 CFR 3107.5 necessarily followed from the decision of the area oil and gas supervisor denying appellant's request for termination of its unit agreement. In basing its appeal upon the initial denial, appellant is in effect asking this Board to indirectly review the decision of the area oil and gas supervisor. This, the Board will not do.

[4] The proper forum for review of a decision of the area oil and gas supervisor is set forth in 30 CFR 290.2:

Any party to a case adversely affected by a final order or decision of an officer of the Conservation Division of the Geological Survey shall have a right to appeal to the Director, Geological Survey, unless the decision was approved by the Secretary or the Director prior to promulgation.

Appellant states that it was unaware that the supervisor's decision of January 19, 1978, was a final appealable decision. With respect to the supervisor's decision of February 27, 1978, appellant states, "Although we then believed that an appeal therefrom should be taken, no right of appeal was granted in that decision." Appellant's request of February 17, 1978, for reconsideration of the supervisor's decision supports its statement that it was in doubt whether an appealable decision had been made.

The power of this Board to review a decision of Geological Survey is set forth in 30 CFR 290.7: "Any party to a case adversely affected by a final decision of the Director, Geological Survey, * * * under this part shall have a right of appeal to the Board of Land Appeals in the Office of Hearings and Appeals, Office of the Secretary."

This Board is unable to review indirectly the decision of the area oil and gas supervisor by reviewing a subsequent BLM decision. Hence the appeal of the Geological Survey decision must fail on this ground.

The regulations set forth above, 30 CFR 290.2 and 30 CFR 290.7, are ample authority to dispose of appellant's request that the Board hear a direct appeal of the decision of the area oil and gas supervisor. In support of its request, appellant cites George Gabriel, 33 IBLA 44 (1977), for the proposition that this Board can hear an appeal from an interlocutory decision which forms the basis of a subsequent BLM decision.

The Gabriel case, however, is not on point. Therein, the interlocutory decision was not subject to an appeal. This is not the case under the present facts. Phoenix did have a right to appeal the decision of the area oil and gas supervisor pursuant to 30 CFR 290.2. It did not avail itself of this right.

This Board cannot hear a direct appeal of a decision of the area oil and gas supervisor. The proper avenue for appeal to this Board is set forth in 30 CFR 290.7.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Wyoming State Office, BLM, is affirmed, and the purported appeal of the decision of the oil and gas supervisor, Geological Survey, is dismissed.

Douglas E. Henriques
Administrative Judge

I concur:

Frederick Fishman
Administrative Judge

I concur in the result:

Joan B. Thompson
Administrative Judge

